STATE OF ILLINOIS

ILLINOIS COMMERCE COMMTSSION

April 10, 2000

Illinois Commerce Commission :
On Its Own Motion

00-0271

Approval of the Plan of Record :
required by Condition 29 of
Docket 98-0555

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Dear Sir/Madam:

Enclosed is a copy of the Dissenting Opinion to the Order entered by the Commission on April 5.2000, filed by Commissioner Ruth K. Kretschmer.

Sincerely,

Donna M. Caton

Donna M. Caton
Chief Clerk

SC

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DISSENTING OPINION OF COMMISSIONER RUTH K. KRETSCHMER
ON THE ORDER ENTERED BY THE COMMISSION APRIL 5, 2000

I respectfully dissent from the Commission's adoption of an Order that delays a decision on how the independent third party will be used in the event of arbitration in Phases 2 and 3. The Commission need only to look at the administrative process to find the proper role for the third party. The Commission's action to delay the decision regarding the third party's role serves no purpose. Under the administrative process the only role the third party can play in an arbitration in Phase 3 is that of a witness. The Commission cannot ignore the processes in place, and using the third party as a special assistant to the Commission does not conform to the confines of the administrative process. The Commission cannot invent a process to enforce its merger Order. The Commission must meet its objectives within the confines of our administrative system. There is no reason to delay the decision when the Commission has only one choice, and that choice is to use the third party as an expert witness during the arbitration in Phase 3. Additionally, making the decision now will reassure the parties that their rights will be protected.

The Order takes a wait and see approach which tells the parties the Commission is going to invent the rules of the game as the process moves along. This wait and see approach is unfair to the parties involved and undermines the administrative procedures that this Commission is bound to follow.

Using the independent third party as special Commissioners assistant defies all logic and undermines the very underpinnings of procedural due process our administrative procedures protect. The Commission should not wait and see if the parties will waive the ex *parte* communications restriction before telling the parties what the role of the independent third party will be during arbitration. It is apparent the Commission wants to wait and see if the parties will waive any ex *parte* communications, and if the parties do not, the Commission will skirt the ex *parte* rules under the guise of "separate and distinct" proceedings by calling the third party a special assistant.

Unfortunately, the majority has failed to recognize the importance of the third party's role as a witness during any arbitration in Phase 3. If the independent third

party is called upon as a witness during the arbitration in Phase 3 the independent third party cannot be a special assistant to the Commission in Phase 2 without tainting the arbitration in Phase 3. I am dismayed by the legal fiction the Order creates by claiming the two phases are "separate and distinct." Ill. C.C. Docket No. 00-0271, April 5, 2000, p. 3. When, in fact, Phase 3 implements what Phase 2 develops. The merger Order recognizes this connection. The merger Order explicitly states that "[i]n the event that SBC/Ameritech and the participating Illinois CLECs are able to come to written agreement regarding some OSS issues, but not all, those issues that have been agreed upon shall immediately proceed to Phase 3." Ill. CC. Docket No. 98-0555, September 23, 1999, p. 254. Therefore, it is highly likely that the arbitration in Phase 2 will begin concurrently with the implementation of the agreed upon issues in Phase 3.. Consequently, the legal fiction of "separate and distinct" proceedings erodes because Phase 2 and Phase 3 may run concurrently. Additionally, it is highly likely that issues arbitrated in Phase 2 will be arbitrated again in Phase 3.

The potential of the proceedings overlapping highlights the problem of allowing the third party to be special assistants while maintaining their independence. By allowing the third party to be special Commission assistants, the Commission is giving the third party two different roles. One role as an assistant and the other as a witness in the proceeding. If the proceedings are run concurrently, a problem arises as to the biases of the third party. Are they special Commission assistants or expert witnesses? They cannot advise the Commission as special assistants in one proceeding how best to formulate a plan, and then advise the Commission as a witness whether the plan is being successfully executed. Playing both roles causes the fundamental fairness of the process to crumble.

The problems of the third party acting as a special assistant deepen as Section IO-60 of the Illinois Administrative Procedure Act is reviewed. Section IO-60 provides in part:

> (a) Except in the disposition of matters that agencies are authorized by law to entertain or dispose of on an ex parte basis, agency heads, agency employees, and administrative law judges shall not, after notice of hearing in a contested case or licensing to which the procedures of a contested case apply under this Act, communicate. directly or indirectly, in connection with any issue of fact. with anv person or oartv. or in connection with any other issue with anv oartv or the representative of anv party, except uoon notice and oooortunitv for all parties to participate.

5 ILCS 100/10-60(a), *emphasis added.*

There is no question that Phases 2 and 3 are inextricably tied together by the same issues and to ignore this fact ignores the Commission's ex *parte* communications restriction. Consequently, the Commission's legal fiction of "distinct and separate"

proceedings in Phases 2 and 3 runs afoul of Illinois law. The Commission cannot, in good faith, allow the third party to advise them during the arbitration in Phase 2 when the same issues may be litigated in Phase 3. Furthermore, the possibility that the third party may begin its testing while the arbitration in Phase 2 is still on-going, taints the arbitration in Phase 3. The bottom line is that the Commission cannot avoid trampling on the rights of the parties and avoid tainting the proceedings if the third party is a special assistant to the Commission. The Commission cannot avoid ex *parte* restrictions by making the third party a special assistant to the Commission, The Commission is wrong in believing it can mask these issues with the guise of "separate and distinct" proceedings.

The notion of a special Commission assistant raises more procedural red flags upon further review of the ex parte communications restriction. Section IO-60 of the Illinois Administrative Procedure Act also provides:

> (b) an agency member may communicate with other members of the agency, and an agency member or administrative law judge may have the aid and advice of one or more personal assistants.
>
> 5 ILCS 100/10-60(b).

The third party is neither a member of the Commission nor a personal assistant. Although the Commission is retaining the third party pursuant to a Commission contract, the Commission is not paying for the services of the third party. The merger Order states that SBC/Ameritech will bear the costs of the third party. The fact that the Commission is not paying for the third party's services removes any nexus the third party could possibly have as an agency member.

If the Commission dictates that the third party must play two roles, the Commission will open itself for an appellate court's reversal. Any appeal will slow down the implementation process and delay opening Illinois telecommunications markets to competition. To believe the parties will stand by idly while the Commission is receiving an outside opinion relating to issues raised by the parities without allowing the parties a chance to respond to the opinion is naive and shortsighted.

Reviewing the administrative process makes it perfectly clear how the Commission should use the third party. If the Commission is to enforce its merger Order and open up the Illinois telecommunications market, the only role the third party can play is one of an expert witness. The third party cannot play any other role without compromising the administrative process.

Our own Staff and the third party have expressed concern over the fact that if arbitration is invoked in Phase 2, the independence of the third party may be compromised. Therefore, the third party is best utilized by participating in the collaborative and then preparing to implement the agreed upon issues of Phase 2 in Phase 3. This

allows the parties to finish arbitration in Phase 2 while the independent third party remains independent and works to implement the agreed upon issues in Phase 3. This scenario creates an efficient procedure while maintaining the third party's independence, and most importantly, is fair to all parties involved.

I believe'the Commission's adoption of SBC/Ameritech's Plan of Record submitted pursuant to Docket 98-0555 is proper. However, I note that I am not pleased with the substance of the Plan of Record and continue to believe SBC/Ameritech should provide a more detailed Plan of Record than the one adopted today. I hope that SBC/Ameritech will be more forthcoming during the collaborative process and show a commitment to open the Illinois telecommunications market to competition.

For the forgoing reasons, I respectfully dissent from the order entered today.